### C. The Decision's Adoption of an Order Requiring Carriers to Unbundle Their Networks' Radio Links Is Undermined by Numerous Errors of Law and Fact and Violates Cellular Carriers' Due Process Rights

#### 1. At a Minimum, Hearings on Unbundling Are Required

The Decision readily admits that it has left unanswered whether its proposed unbundling of the cellular network to accommodate the interconnection of reseller switches is technically feasible. Decision, FOF 53. To substantiate this new policy, the Commission merely asserts that the record previously developed in D.92-10-026 and the comments filed in this Investigation form a sufficient basis to adopt this measure. Decision at 80. The Commission considered the reseller switch proposal in its Phase III Decision 92-10-026, where it found that the resellers' switch proposal, "relie[d] upon capabilities of switches and switch software that have not yet been developed, tested, and made available on the open market." Despite those findings, the Commission decided to reaffirm that decision in D.94-08-022. Accordingly, cellular resellers will not have to prove the engineering or technological feasibility of their switches, based on the Commission's rationale that there is no incentive for resellers to invest in a switch that cannot communicate with facilities-based switches.

Notwithstanding that finding, the actual feasibility of a reseller switch is a factual issue that should be determined through expert testimony. Without expert testimony or empirical data reflecting the technological feasibility of unbundling, it

cannot be determined whether any of these proposed changes are appropriate for California's communications system. Again, the Commission is required to make sufficient findings based upon facts established through expert testimony and cross-examination. See CMA at 258-290. In that case, the Court annulled a Commission decision for lack of sufficient findings and for lack of expert testimony to demonstrate the actual impact of the Commission's proposed policy on ratepayers. id. at p. 259. The "actual impact" of unbundling is equally at issue in this case. Certainly, the Commission recognizes the importance of considering technical feasibility. That recognition is exhibited even in the instant Decision where the Commission uses the need to demonstrate technical feasibility as a justification for finding PCS technology will not be a competitive threat in the near future.[27]

D.94-08-022 goes so far as to exempt the reseller switch proposal from existing Commission rules and procedures regarding technical feasibility. As justification, the Commission incorrectly asserts that carriers are not required to prove the feasibility of their switches. On the contrary, every time a carrier puts in a switch, it must demonstrate to the Commission's satisfaction the suitability of the switch. See D.90-08-032. In fact, from the time of the Commission's initial decisions approving certificates of public convenience and necessity for the construction of facilities, the Commission has recognized that proving technical feasibility is a necessary basis for such

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[27] Decision at 30

authorization. See D.83-06-080, 11 CPUC 2d 836 at 842.

Presumably, the public will not even have an opportunity to be heard regarding the feasibility of the switch, as the Decision merely requires that the resellers submit a petition to modify their current certificates of public convenience and necessity for the purpose of eliminating language in current CPC&Ns that prohibits resellers from operating facilities and to ensure compliance with the CEQA.[28] Conversely, Carriers have been required to subject similar plans to public scrutiny. See, e.g., D.90-08-032, 37 CPUC 2d 130, 147 (1990). The resellers should also be required to show that such interconnection will not disrupt the network.

2. The Commission Has Committed Error By Its Failure to Consider The Impact of Unbundling on Cellular Customers And Carriers

The Decision fails to make a finding that the reseller switch will not adversely impact the larger cellular and landline networks. The Commission also unlawfully failed to consider whether implementation of unbundling will cause a degradation in cellular service or inhibition of technological innovation.

Also, the Commission erred in failing to make specific findings of fact and conclusions regarding the impact of unbundling on cellular customers. As noted in Comments submitted by the Division of Ratepayer Advocates ("DRA"), prior to implementing an unbundling plan the Commission must make determinations regarding customer satisfaction. DRA at 18. There are no findings of fact

[28] D.94-08-022 at 83.

or conclusions of law regarding this matter, which should be a fundamental part of any commission action. To the extent that D.94-08-022 lacks this element, the decision is fundamentally defective and warrants rehearing.

The Decision's Finding of Fact 55[29], where the Commission makes a sweeping and imprecise reference to comments and a previously made Commission record as a basis for unbundling, does not satisfy the Commission's obligation to provide specific findings of fact regarding the impact of unbundling. The Commission must consider every issue that must be resolved to reach its ultimate conclusion and provide separately stated findings upon which the ultimate finding is based. See Northern California Power Agency v. Public Utilities Commission, 5 C.3d 370 at 381, 96 Cal.Rptr. 18, 486 P.2d 1218.

### 3. The Commission Erred by Failing to Consider the Competitive Impact of Unequal Treatment Among Wireless Providers

The Commission is required to consider competitive consequences of its actions. As such, the Commission is obligated to consider the effects of unbundling on competition as one aspect of the public interest. Northern California Power Agency v. PUC, 5 Cal.3d 370, 377-378 (1971). Yet D.94-08-022 never explores this fundamental question. It never answers the question of whether unbundling is what one would expect to occur in a competitive mobile telephone service market, with cellular enhanced specialized

[29] Decision at 94.

mobile radio ("ESMR"), and personal communications service ("PCS") in full operation. Nor does the Commission make findings regarding the long term consequences of its artificial market structure. The wireless industry and its customers deserve to have these questions considered. These questions can only be effectively considered through hearings.

4. The Decision Unreasonably Requires Unbundling Over An Eighteen Month Span Of Rate Regulation Without Sufficient Evidence Of The Time Required To Implement the Unbundling Scheme

The Commission appears to arbitrarily pick 18 months as the length of time required to implement and reap the benefits of its proposed unbundling of the resellers switch. The Commission took no evidence on this issue, nor does it make necessary findings of fact. At a minimum, the Commission should have taken evidence regarding the expected installation time of reseller switches. Absent that evidence, the Commission has no idea whether or not its unbundling scheme can, in fact, be implemented in time. Nor does the Commission have either evidence or a record to justify the effort and expense of unbundling for a limited 18 month period. There is no record evidence on the impact this will have on cellular competition. The decision is clearly arbitrary and capricious and lacks critical findings and conclusions to sustain the adoption of an unbundling requirement.

## IV.

## SUBSTANTIAL PORTIONS OF THE DECISION ARE PREEMPTED BY FEDERAL LAW AS FUNDAMENTALLY INCONSISTENT WITH THE REGULATORY SCHEME ESTABLISHED BY THE CONGRESS AND THE FCC

### A. The FCC Has Preempted The Regulation of Interconnection Between Commercial Mobile Radio Service Providers and the CPUC Lacks the Authority to Require Cellular Carriers to Unbundle Their Cellular Networks

The Federal Communications Commission (FCC), pursuant to its authority to regulate Commercial Mobile Radio Service providers as set forth in the Omnibus Budget Reconciliation Act of 1993 ("Budget Act")30/, has preempted the issue of interconnection between commercial mobile service providers, such as a facilities-based cellular carrier and a reseller. Indeed, FCC proceedings currently underway address precisely the same issue of unbundling the cellular radio network which the CPUC has addressed in the decision at hand. However, because state-ordered unbundling of the cellular radio network presents an insurmountable obstacle to the regulatory objectives of Congress as embodied in the Budget Act, the CPUC's order on unbundling may not stand.

#### 1. The Federal Regulatory Scheme for CMRS Providers

In the Budget Act, Congress directly addressed the regulation of mobile communications services. Specifically, Section 6002 of the Budget Act amends Section 332 of the Communications Act of 1934 ("Act") to create two categories of

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30 Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66 (1993).

mobile communication services -- (1) commercial mobile radio service ("CMRS") and (2) private mobile radio service ("PMRS"). The Budget Act established that providers of CMRS are to be treated as common carriers under the Act; whereas PMRS providers are non-common carriers. A critical objective of the Congressional creation of the two new groupings of mobile service providers was to insure that "similar services are accorded similar regulatory treatment." H.R. Rep. 103-213, 103rd Cong., 1st Sess. 494 (1993) (Conference Report).

On March 7, 1994, the FCC released its Second Report and Order in Gen. Docket No. 93-252, 59 F.R. 18499 (April 19, 1994) to begin implementation of the Budget Act amendments. At the outset, the FCC stressed its desire "to implement the congressional intent of creating regulatory symmetry among similar mobile services." Second Report and Order at page 3. In seeking to implement regulatory symmetry, the FCC acknowledged that "preemption of state regulatory authority over mobile service providers" is an issue. Second Report and Order at page 3. However, the FCC made clear that it possesses the authority to preempt any state regulation that "thwarts or impedes our federal policy of creating regulatory symmetry." Second Report and Order at page 96, n. 517.

On July 1, 1994, the FCC released a Notice of Proposed Rulemaking and Notice of Inquiry in order to address matters reserved for later consideration in the Second Report and Order, including the issues of equal access and interconnection obligations related to CMRS. In the matter of Equal Access and

Interconnection Obligations Pertaining to Commercial Mobile Radio Services, CC Docket No. 94-54, RM-8012, 1994 FCC Lexis 3976, Released July 1, 1994 ("NPRM"). In the NPRM, the Commission sought comment on whether it should "establish any interstate interconnection obligations applicable to CMRS resellers using their own switches." NPRM at page 55. The Commission also raised the precise issue of whether it should preempt any state from imposing interconnection obligations and sought comment on the issue. NPRM at 61.

2. The Effect of the CPUC's Decision Ordering Network Unbundling By Cellular Carriers Only

In the instant Decision, the CPUC formally adopted a policy originally proposed at the outset of its Investigation and ordered cellular carriers "to unbundle the cell site radio segment of its operations from all landline network functions and ancillary functions for tariffing purposes." Decision at 76. According to the Decision, the unbundling requirement will permit the interconnection and use of reseller switches. Decision at 80-84.

Thus, under CPUC's new regulation, cellular carriers are forced--upon receipt of a bona fide request from a reseller--to physically modify their system to unbundle the radio signal from the other services provided by cellular carriers and to accommodate interconnection with reseller switching equipment.

In addition, the carrier must reconfigure all of its wholesale service offerings to provide unbundled rate plans and

charges, and it must continually repeat this process for any new service offerings. The Commission's justification for its action is that unbundling of the radio signal is necessary to mitigate the alleged market power of the cellular carriers. Decision at 81.

### 3. The CPUC Unbundling Order Is Fatally Inconsistent with Federal Policy And Thus Is Preempted

The Commission asserts that its action is not inconsistent with any federal statute, policy, or rule because the interconnection and use of a reseller switch is not precluded by any such federal directive. Decision at 82. The Commission says its authority is:

> "confirmed by the September 26, 1991 response of the FCC to CSI regarding CSI's query as to the legality of interconnection of a resellers switch..." Decision at 82.

That letter, however provides no valid basis for the Commission's assertion. First, the two-paragraph FCC letter is an informal opinion letter from the FCC staff which says absolutely nothing about whether a state has the authority to mandate unbundling. The letter issued by the FCC staff obviously assumes that the question submitted by Cellular Services, Inc. ("CSI") regarding switch unbundling was to be considered within the context of FCC jurisdiction. Nor does the CSI letter to which the FCC letter responds asks anything about a state's authority to unbundle. Furthermore, the letter is dated September 26, 1991, almost two years prior to passage of the Budget Act. The Congress and the FCC, as described above, have since made abundantly clear that they view such burdens as a matter of federal concern.

In addition, the FCC staff letter was submitted to the Commission within the context of CSI's Reply Comments. Since the Commission did not permit third round comments or evidentiary hearings in these proceedings, parties were left without an opportunity to respond to the letter upon which the Commission ultimately relied as authority for its unbundling measures. The fact that parties requested a hearing on whether the Commission has such authority,[31] and that parties were unable to note for the record the FCC letter's dubious worth, underscores the legal insufficiency of this evidence to support the Decision's conclusion regarding jurisdiction.

The CPUC's forced unbundling of cellular carriers radio signals will discriminate between cellular carriers and other CMRS providers who will not be obligated to unbundle their systems. This makes a mockery of the central Federal policy of regulatory symmetry, thereby infringing on FCC authority and burdening interstate commerce.

By imposing an onerous regulatory burden singularly upon cellular carriers, those carriers will be forced to compete at a disadvantage with non-cellular CMRS competitors providing similar service, yet unfettered by the Commission's rules on mandatory unbundling. Even though the Commission calls its unbundling policy an "interim measure", in fact, it is not. Under D.94-08-022, cellular carriers will be forced to spend substantial sums money

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[31] See e.g., Opening Comments of PacTel Cellular dated February 25, 1994 at 71 filed in I.93-12-007.

(the exact amount of which is unknown at this time, of course, as the Commission denied evidentiary hearings) on the physical reconfiguration of their networks as well as the ongoing effort to segment services and allocate costs to special unbundled rate plans for resellers. As long as a cellular carrier is forced to incur these additional costs, which are, strictly speaking, unnecessary for the provision of service to cellular customers, those costs will negatively impact the carriers' ability to compete in the future competitive marketplace envisioned by Congress. This policy of non-cellular preference "thwarts and impedes" the Congressional objective or regulatory symmetry and is, therefore, unlawful and subject to preemption.

In addition, the Decision's unbundling provisions are unlawful because the FCC has asserted its jurisdiction over interconnection of interstate calls. To the extent that the mandatory unbundling is imposed upon interconnections used in interstate commerce, that unbundling is illegal. See Louisiana Public Service Comm'n v. F.C.C., 476 U.S. 355, 369-70 (1986); Kassel v. Consolidated Freightways, Inc., 450 U.S. 662, 670-671 (1981); 101 S.Ct 1309. (The nature of the state regulatory concern must be weighed in light of the extent of the burden imposed on the course of interstate commerce.)

B. The CPUC May Not Implement New Rate Regulations Adopted After June 1, 1993 Until and Unless the FCC Grants Such Ratemaking Authority to the Commission

The Comments and Reply Comments of CCAC and various cellular carriers argued that the Budget Act amendments to the Communications Act render the adoption of new state rate regulations for mobile telephone services invalid until and unless the FCC grants a state the necessary rate regulatory authority. As the Budget Act states,

> If a State has in effect on June 1, 1993, any regulation concerning the rates for any commercial mobile service offered in such State on such date, such State may, no later than 1 year after August 10, 1993, petition the Commission requesting that the State be authorized to continue exercising authority over such rates. If a State files such a petition, the States's existing regulation shall, notwithstanding subparagraph (A), remain in effect until the commission completes all action (including any reconsideration) on such petition.

47 U.S.C. Section 332(c)(3)(B).

Regulations not in effect as of June 1, 1994 are, therefore, subject to the provisions of Section 332(c)(3)(A), which provides that all state regulations affecting CMRS rates and entry are preempted until and unless the FCC grants the states new regulatory authority pursuant to a petition filed under the procedures set forth in the Budget Act. It is undisputed that the neither the network unbundling regulation nor the Extended Area Service wholesale roaming rate regulations adopted in the instant Decision were in effect on June 1, 1993.

The Commission, however, does not view Section 322 of the Communications Act as prohibiting any modifications in specific

state regulatory rules and procedures, stating that "As stated in the FCC Second Order and Report (Sec.III.F.2), it is the authority to regulate, not the specific rules in effect at some point in time which is subject to extension pending a ruling on the petition." Decision at 82, Conclusion of Law 1. The Second Report and Order, however, does not make any such distinction. It instead directly incorporates by citation crucial elements of Section 332(c)(3)(B) of the Act, stating that...any state that has rate regulation in effect as of June 1, 1993, may petition the Commission to extend that authority...." More to the point, the precise language of the Budget Act itself, which is the ultimate source of the FCC's preemptive authority, does not support the Commission's interpretation. Section 332(c)(3)(B) states in relevant part that, "[i]f a state files such a petition, the State's existing regulation shall, notwithstanding subparagraph (A), remain in effect until the Commission completes all action (including any reconsideration) on such petition." The plain language of this statue contemplates retention of the existing regulation of cellular carriers, and gives no indication whatsoever of an unfettered grant of discretion to the states to adopt any new forms of regulation they desire. To the extent D.94-08-022 implements new wholesale unbundling and EAS regulations which were not in effect on June 1, 1993, Conclusion of Law 1 is in error and the decision is unlawful.

## V.

## THE COMMISSION'S ORDERS ON EXTENDED AREA SERVICE ARE AMBIGUOUS, INTERNALLY INCONSISTENT, AND UNSUPPORTED BY ADEQUATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

### A. Blanket Authorization of EAS Service

The Commission's discussion of roaming charges between carriers in different service territories and between resellers and carriers is problematic in several respects. In the first instance, CCAC notes that the Commission has properly found that there is no legal restriction against carriers "re-rating" or adjusting the bills for roaming service paid by their home customers while in other carriers' service territories. Decision at 87. However, while stating that "for sake of clarity" the Commission will "amend all CPCNs for cellular carriers to include a blanket authorization permitting EAS service anywhere within California", no corresponding ordering paragraph is to be found in the decision. Thus, the first ambiguity is the absence of a Commission order actually making the referenced amendment to all cellular certificates for public convenience and necessity. The Commission should upon rehearing issue a specific order stating that all cellular carriers holding CPCNs issued by the CPUC shall be authorized to offer EAS service anywhere within California.

#### 1. The Commission's Discussion of EAS Service Is Fundamentally Inconsistent with Its Findings, Conclusions and Ordering Paragraphs

The Commission engages in a very vague and inconclusive discussion of EAS rates and roaming charges in the body of the Decision. The Commission commences this discussion by concluding

properly, as mentioned above, that carriers are free to offer EAS service to its "home" customers who roam in other carriers' service territories, and that the carrier may gain or lose revenue by this practice--"a risk of doing business", as the Commission puts it. Decision at 87. Next, the Commission concludes that such practices do not result in discriminatory rates, which is also correct. However, without any explanation or justification whatsoever, the Commission next states that it agrees with the Cellular Resellers Association that "revenues from re-rating for EAS service should be shared in an equitable manner with cellular resellers in the interests of promoting a competitive market." Decision at 88, emphasis added. The Commission provides no guidance whatsoever as to what "equitable" means in this context. In the last sentence of the discussion, the Commission states, "[w]e find it reasonable to adopt the terms of the settlement into which CRA entered with McCaw/AT&T in A.93-08-035 as a basis for sharing of EAS revenue." Decision at 88.

The settlement referred to provided merely for an extension of roaming agreements between McCaw and certain resellers to be extended to all McCaw cellular utilities. See page 6 of a document entitled "Agreement" filed with the Notice of Execution of DRA Settlement Agreement, filed on or about January 10, 1994 by DRA in A.93-08-035, and approved by the Commission in D.94-04-042 on April 6, 1994. Neither the instant decision nor the decision approving the AT&T/McCaw settlement discussed the actual terms of any such EAS revenue sharing agreement between cellular carriers

and resellers at all. It may be inferred from this discussion and various McCaw tariffs that the Commission believed that resellers should be billed by the serving carrier for the roaming service of its home customers at a rate lower than that charged other served carriers, i.e. less a "margin" of some sort, so that resellers could make profits from the roaming service provided by carriers in other service territories.

However, any such interpretation is fundamentally at odds with prior Commission precedent, and indeed, with the conclusions of law and ordering paragraphs of the instant decision. In D.90-06-025, the Commission discussed reseller roaming revenue and specifically rejected the notion that resellers should be allowed a "markup" in the rates they are charged for their customers roaming service. The Commission noted that the bulk of roamer billing costs are handled by carriers, not resellers. D.90-06-025, 36 CPUC 2d 464, at 486-7, findings of fact 68, 69. The Commission only went as far as encouraging carriers to share revenue from roaming with other carriers through negotiated agreements. Id. at Ordering Paragraph 6, p. 516. Indeed, the Commission observed that "[r]esellers are not precluded from marking up their tariff rates to end users for roaming services." Id. at 487. This decision provides no support whatsoever for mandating that carriers offer resellers any margin or markup in the form of reduced roaming charges. Yet D.94-08-022 provides no new evidence or explanation or justification of any kind for modifying the previous decision.

More importantly, the instant Decision contains findings

and conclusions which directly contradict the notion that resellers should receive any "margin" or "markup" on roaming rates. Finding of Fact 59 states that resellers are to be treated as cellular carriers for interconnection purposes. Decision at 94. Conclusion of Law 10 states, "It is reasonable that intercarrier agreements for EAS service be publicly filed, and that any serving carriers charge the same wholesale rate to resellers as to other serving carriers." Decision at 96, emphasis added. Taken together, this finding and this conclusion clearly indicate that resellers are not to be given a status or to be charged a rate different than that charged by the serving carrier to the home carrier of the roaming cellular customer. This conclusion is buttressed by Ordering Paragraph 6 which provides that "Any serving carrier providing EAS service shall charge a wholesale rate to the served carrier (including resellers)." Decision at 97. Once again, no justification appears for resellers to obtain any special roaming rate different that than obtained by the served carrier.

It is settled Commission precedent that "an order of the Commission cannot be sustained if it is contrary to or not supported by the findings contained in the decision of the Commission." California Trucking Assn., D.87-11-032, 26 CPUC 2d 93; D.81766, 75 CPUC 433. Accordingly, the inference or implication in the text of the decision that resellers are entitled to a special wholesale rate which provides them with a larger share of roaming revenues than a cellular carrier whose customer has engaged in roaming is completely contradicted by the findings, conclusions and

ordering paragraphs of D.94-08-022 and is *per se* invalid.

## VI.

## THE COMMISSION SHOULD IMPOSE A STAY OF ITS ORDERING PARAGRAPHS MANDATING UNBUNDLING OF CELLULAR CARRIERS' NETWORKS AND EAS WHOLESALE TARIFFS

CCAC believes circumstances warrant the imposition of a stay by the Commission of its order directing cellular carriers to implement unbundling, and wholesale EAS tariffs and thus respectfully requests that the Commission impose an immediate stay pending Commission, Court, and FCC review of those Ordering Paragraphs 1 through 7 which implement the unbundling of the "resellers switch" and impose a requirement for EAS wholesale tariffs.

### A. The Commission's Standard For Granting Stays Favors Avoiding The Imposition Of Unnecessary Costs And Burdens Upon Utilities

While the Commission has yet to articulate a specific criteria for issuing stays of its own decisions, a review of recent Commission Orders in which stays are imposed does suggest a CPUC standard for the granting of stay requests. That standard is attuned to preventing harm by granting a stay prior to potential harm. Absent from the Commission's standard is any required showing of "irreparable injury," as is required by the Commission when issuing a preliminary injunction.[32] Indeed, even where a utility has not provided substantiation for allegations of possible

[32] See Westcom Long Distance v Pacific Bell, D94-04-082, 1994 Cal.PUC LEXIS 339, [*49]

irreparable harm, the Commission has nevertheless imposed a stay on the grounds that harm was "plausible". TURN v. Pacific Bell, D.94-05-026 (May 4, 1994). The Commission may also impose a stay where it believes a utility will incur unnecessary costs and burdens should the decision be reversed. In D.93-08-031, Pacific Bell again failed to show that serious harm would ensue from complying with a contested Commission decision. Despite Pacific Bell's failed showing, the Commission granted Pacific Bell's request for a stay, reasoning that:

> "Although we do not necessarily agree that Pacific will be seriously harmed if it is required to comply with the decision at this time, we believe that Pacific may incur unnecessary costs and that customers may be confused if Pacific is required to implement the decision and the decision is modified or reversed upon Commission review." D.93-08-031 (1993)

In addition to granting stays under circumstances were a utility may unnecessarily incur costs or burdens, the Commission has found the issuance of a stay appropriate where it is alleged that a decision would be difficult to undo.[33] In D.94-04-087, the Commission granted a request for an emergency stay of an order which would have authorized and ordered refunds for certain access charge rates collected from interstate shippers of natural gas. The Commission noted that:

> Since....the making of refunds in this matter may be difficult to undo, we will grant DRA's request for an emergency stay." Id. at 1.

In sum, the Commission has maintained the "status quo"

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[33] D.94-04-087, 1994 Cal. PUC LEXIS 346 at [*1]

when a utility is able to demonstrate (but not conclusively prove) potential harm, should the contested decision be ultimately modified or reversed.

### B. Carriers Will Suffer Irreparable Injury And Incur Unnecessary Costs And Burdens if Required to Comply With Unbundling Should D.94-08-022 Later Be Determined To Be Unlawful

Commission precedent supports the instituting of a stay under the circumstances currently faced by cellular carriers, who presently must unbundle their respective systems to accommodate the reseller switch. Although the Commission envisions its unbundling order as an interim measure,[34] the Commission must recognize that the measure, in fact, will have a long term, burdensome effect on cellular carriers. The costs and difficulties of implementing unbundling have been detailed in the comments of cellular carriers who note that an unbundling order will create difficulties for the cellular carriers that their other wireless competitors will not face, and that it will be difficult and time consuming to implement, as carriers must modify their respective infrastructure to accommodate resellers.[35]

Additionally, carriers will be forced to engage in detailed cost allocations to unbundle every wholesale rate offering and to reveal to reseller competitors their wholesale cost data.

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[34] Decision at 2.

[35] Comments of McCaw Cellular Communications, Inc. dated February 25, 1994 at 30-33; See Also Initial Comments of GTE Mobilnet Of California Limited Partnership and GTE Mobilnet of Santa Barbara Limited Partnership dated February 25, 1994 at 19. filed in I.93-12-007

Cellular carriers will bear this anticompetitive handicap while their competitors will face no obligation to unbundle their rate plans, let alone permit interconnection of reseller switches. The effect of mandatory unbundling will be reflected in cellular carriers' cost of providing service for what may be many years.[36] Because unbundling the radio links in the network does not enhance the service provided to consumers, such costs may not be recoverable by carriers as part of the market price for providing cellular service. If mandatory unbundling is imposed upon cellular carriers, and D.94-08-022 is later modified or annulled, it is more than "plausible" that cellular carriers would suffer the irreparable harm of reduced ability to compete, degradation of their system, and unrecoverable costs.

This burden is particularly acute in light of the fact that the Commission contemplates an effective life of these regulations of only 18 months before competition renders such requirements superfluous. Decision at 5. The process required to negotiate, develop, and offer unbundled wholesale services after a reseller request and the length of time required to install a reseller switch is wholly unreasonable in light of the 18 month life of the regulation. Nor does the record contain any evidence to support the feasibility of installing and operating such an unbundled system within that time, or that if unbundled services are implemented within that time they will have any effect on

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[36] Opening Comments of PacTel Cellular dated February 25, 1994 at 67-68 filed in I.93-12-007

increasing competition within the cellular market.

Aside from facing challenges raised by applications for rehearing and possible state and federal judicial review, the Commission's Decision will undoubtedly face examination by the FCC, where the Commission's interpretation of the preemptive provisions of the OBRA of 1993 will surely be challenged. The record contains evidence that carriers will incur great costs and disadvantages by unbundling the reseller switch. Should it be determined that the decision is unlawful in any respect, cellular carriers will be left to bear substantial wasted expense and effort. Under the standards suggested by the Commission in D.94-05-026 and D.94-04-087, a stay of D.94-08-022 is clearly in order.

Finally, the unbundling requirements ordered by D.94-08-022 would be difficult to undo. Once resellers impose their equipment and interconnection requirements upon the cellular carrier, and carriers and resellers alike go through the cost and effort to fully implement the system, it would indeed be an arduous task to then dismantle that system. This, of course, assumes that it is even technically feasible to implement the reseller switch, an assumption that cellular carriers and ESMR provider Nextel "strongly doubts."[37]

One clear victim in this "now you have it, now you don't" scenario is the cellular customer, who would ultimately pay for this 18 month-long dance of jumping from bundling to unbundling,

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[37] Opening Comments of Nextel Communications, Inc. dated February 25, 1994 at 20.

and thence back to bundling. The risk of confusion and harm to customers in such a situation is great. The Commission has been very sensitive to such risks in considering stays in the past. As a result, because of the risk to customers and carriers, and the difficulty in trying to "undo" reseller switch interconnection, Commission precedent as represented by D.94-04-087 dictates that a stay is warranted.

### C. The Commission Should Stay Its Extended Area Service Orders In D. 94-08-022

As discussed in the preceding section, the Commission's treatment of EAS rates is extraordinarily confused and internally contradictory. If the dicta in the text is read as ordering the serving cellular carrier to grant resellers a margin--in effect a rate lower than that charged to served facilities-based carriers (Decision at 88), then such a conclusion is completely contradicted by the Decision's conclusions of law and ordering paragraphs which unequivocally state that serving carriers should, "charge a wholesale rate to the served carrier (including resellers)." Decision, conclusion of law 11, at 96, emphasis added. Such language contemplates one rate, not one wholesale rate for served facilities-based carriers and another for resellers. There can be no question that facilities-based carriers whose customers are extended roaming service by the serving carrier are themselves "wholesale" carriers entitled to a wholesale rate, as they are billed for the roaming service of their home customers on a volume basis and re-bill to their customers. The actual language of conclusion of law 11 and ordering paragraph 6 thus provides no

basis for any distinction between resellers and other carriers in terms of the rate charged by the serving carrier.

On the other hand, if the conclusions of law and ordering paragraphs are to control, as they should, the Decision remains ambiguous and contradictory, and leaves the carriers in considerable confusion about exactly what type of wholesale EAS rates are to be applied. The Commission provides no guidance whatsoever about its definition of the "equitable" sharing of revenues from re-rating EAS for home territory customers. Nor does the Commission fully discuss this complex issue. Assume, for example, that a carrier actually re-rates roaming charges to give its home customers a <u>discount</u> when roaming in other service territories. This may very well result in a net loss to the carrier, but one which it is willing to bear for competitive purposes. Are the resellers to "equitably share" in the loss sustained by such a carrier? If so, the Commission has neglected to indicate how carriers are to bill resellers for such costs. If not, what right does the reseller have to a share of any profits obtained from re-rating roaming charges which result in higher revenues? The Commission has completely neglected the two-way nature of the EAS rate issue. Additional confusion is caused by the Commission's apparent belief that serving carriers directly bill resellers for their customers roaming service. Decision, Conclusion of law 11, at 96. This is not the case. Nationally recognized protocols provide that the roaming charges will be billed between the facilities-based carriers, and the served

carrier will re-bill the resellers for any roaming by that reseller's customers.

Furthermore, by not permitting a hearing on EAS issues, the Commission is attempting to resolve a complicated rate design issue with a horribly incomplete record, and without any substantive factual information whatsoever. The Commission's decision is inadequately supported by the findings of fact or conclusions of law, and the record is bereft of evidence to properly resolve the issue. Given the need for a more detailed evidentiary record, the need to hold hearings, and the paramount need to avoid throwing the carriers, resellers and their customers into extraordinary confusion over roaming charges, the Commission should stay ordering paragraphs 5-7 of D.94-08-002 until a proper record can be developed. This would allow the Commission to issue a decision which carefully and consistently addresses all of the issues associated with EAS rates.

As outlined above, Commission precedent supports the issuance of a stay where there is the risk that utilities and their customers may sustain unnecessary cost and confusion. D.93-08-031, supra. That is clearly the case here, where parties will undoubtedly be lead into conflicting interpretations of the Commission's intent as a result of the conflicting dicta in the body of the decision and conclusions of law. To avoid such disruptive consequences, the Commission should simply take the time to revisit the issue properly, and the issuance of a stay is the first step in that process.